U.S. Department of Labor

Office of Administrative Law Judges
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MAILED: 2/20/2001

IN THE MATTER OF:	*	
Gary L. Bursell Claimant	*	
Against	*	Case Nos.: 2000-LHC-0319/0512
Electric Boat Corporation Employer/Self-Insurer	*	OWCP Nos.: 1-146025/1-146023
and	*	
Director, Office of Workers' Compensation Programs, United States Department of Labor Party-in-Interest	*	

APPEARANCES:

Stephen C. Embry, Esq.
For the Claimant

Colette S. Griffin, Esq.
Keith E. Marquis, Esq.
For the Employer/Self Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33

U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on June 29, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit Number	**Item**	**Filing Date**
CX 12	Attorney Embry's letter suggesting a briefing schedule	09/18/00
EX 12	Attorney Griffin's letter filing	09/19/00
EX 13	Claimant's work absence records and his claim for long term disability benefits	09/19/00
CX 13	Attorney Embry's letter confirming the briefing schedule	10/03/00
EX 14	Employer's brief	10/10/00
CX 14	Attorney Embry's letter filing his	10/18/00
CX 15	Fee Petition	10/18/00
EX 15	Employer's reply brief	11/24/00
CX 16	Claimant's brief dated September 14, 2000	12/07/00
CX 17	Claimant's reply brief	12/07/00
EX 16	Attorney Griffin's status letter	12/11/00

CX 17A	Attorney Embry's reply	12/20/00
CX 18	Attorney Embry's letter filing	12/20/00
CX 19	Transcript of the deposition testimony of Dr. Baker	12/20/00
CX 20	Form LS-201, dated February 2, 1999	12/20/00
CX 21	Form LS-203, dated February 2, 1999, as well as a copy of CX 11, a document admitted at the hearing	12/20/00
CX 22	Attorney Embry's letter filing his	01/08/01
CX 23	Supplemental Fee Petition	01/08/01

The record was closed on January 8, 2001, as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. Claimant and the Employer were in an employee-employer relationship at the relevant times.

2. In April of 1999, Claimant alleges that he suffered an injury in the course and scope of his employment.

3. Claimant gave the Employer notice of the injury on or about .

4. The claim for compensation is dated February 2, 1999 (CX 21) and the Employer's notice of controversion has not been filed herein.

5. The parties attended an informal conference on September 29, 1999.

6. The applicable average weekly wage is $1,162.79.

7. The Employer has paid no benefits herein.

The unresolved issues in this proceeding are:

1. Whether the Longshore Act applies.

2. If so, whether he has sustained a work-related injury.

3. If so, whether he gave timely notice of such injury and timely filed for benefits.

4. If so, the nature and extent of his disability.

5. The date of his maximum medical improvement.

6. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Gary Bursell ("Claimant" herein), fifty-two (52) years of age, with a high school education and an employment history of manual labor, began working in 1965 as a pipe lagger at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. As a pipe lagger, Claimant had duties of installing asbestos as insulation around the heating pipes, equipment and machinery as needed all over the boats. He did this work for two years or so and he then applied for transfer to work as a computer operator in Nuclear Quality Control Engineering; he was accepted for that program and he went though an apprentice program to learn how to operate the computers. In 1969 he became an analyst in the Nuclear Quality Control Engineering and his duties involved, **inter alia**, often making decisions about the construction, repair or overhaul of submarines that executives of the Employer, for example, would not like and with which decisions they disagreed. (TR 41-43)

As an analyst Claimant daily went to the boats and worked directly with the trade foremen, trade supervisors, engineers,

welders, lead bonders and other such employees to discuss the myriad problems that arise in the shipbuilding industry, such as how to improve and correct any problems, how to design a particular component or system to solve that problem, etc. He daily worked with the engineers and he would often go down to the boats, especially after an engineer would tell him that such an item could not be done in terms of a design change, Claimant remarking that it would be his task to effectuate a particular design change not only on that specific boat but also on all future boats built in that submarine class. According to Claimant, the Ship Superintendent is his client and Claimant enjoys a good relationship with him. The "Sup. Ship" people are down on the boats daily and they write up "a deficiency notice" and it would then be Claimant's job to investigate that situation, to determine what steps have to be taken to resolve that problem and then implement and effectuate those design changes with the engineers and other pertinent personnel at the shipyard, Claimant remarking that his work is an integral part of the shipbuilding industry. (TR 44-54)

Claimant testified that the **U.S.S. Nautilus**, the first nuclear-powered submarine, came in for an overhaul to be refurbished and brought up to then current U.S. Navy specifications and he was assigned to that submarine as the NQC specialist. He was on that vessel daily and Claimant was exposed to grinding dust and fumes generated by the removal of old components and equipment which had to be replaced. He worked many long hours to ensure that all key events and deadlines were met. (TR 54-57)

Claimant would often be telephoned at night at home to discuss a critical situation and he would then go to the shipyard to work on and correct that problem. Claimant enjoyed an excellent reputation at the shipyard and his supervisors gave him wide latitude to make important and significant decisions, even though those decisions resulted in the termination of a particular test until the problem could be resolved. As the decision to stop that test slowed down the work schedule and resulted in extra expenditure of money and resources, his work created a very stressful situation, all of which led Claimant to decide to leave the shipyard in January of 2000, especially as the downsizing of the shipyard work force caused Claimant to have to work longer hours and longer days, with less resources to deal with the various problems given to him for resolution. (TR 57-64)

On February 9, 1979 Claimant slipped and fell on an oily substance during a rainstorm and he "fell and ruptured a disc in (his) back." He was rushed to the nearby Lawrence and Memorial and then was admitted to Hartford Hospital where Dr. Scoville removed the ruptured disc; in fact, two surgeries were performed on Claimant. (CX 6) Claimant returned to work with permanent restrictions against lifting over twenty-five (25) pounds, Claimant remarking that he has continued to experience lumbar pain ever since that injury, as well as lumbar stiffness in the morning and/or in cold and damp weather. (TR 55-57; EX 4)

Claimant has also experienced chest pains since at least the early 1990s (CX 4) and he was out of work from April 30, 1996 through May 12, 1996 because of "chest pains," for which problem he was treated by Dr. Job L. Sandoval. (CX 4) Claimant's May 7, 1996 echocardiogram was read as abnormal as showing, **inter alia**, pulmonary hypertension. (CX 5) Elevated cholesterol was reported on October 30, 1998 and Claimant's November 20, 1998 exercise treadmill test had to be ended because of fatigue. Dr. Peter Milstein diagnosed "mild to moderate cardiomyopathy" as of November 2, 1998. (CX 5)

Claimant's stressful conditions at the shipyard persisted and he would often find trade foremen at his office door when he came to work that day. He has been sent a number of times to other shipyards, Claimant remarking that he was a "very conscientious" worker who worked 10-11 hours daily, 6 days each week. That work stress caused shortness of breath and chest pains to such an extent that his doctor suggested that he close his door and take nitroglycerine as needed for his chest pains. However, Claimant testified that such isolation is not possible at the shipyard. Claimant has been seen by a number of doctors and one doctor has suggested that he work four hours per day but, again, this is not possible as his work load required that he work more than those hours. Claimant asked his supervisors for help but they were unable to do so because of the shipyard downsizing. In 1989 Claimant was treated for ulcerative colitis, a condition caused by his work stress, including those meetings in which some members of the finance department would challenge certain decisions made by Claimant, especially those resulting in increased shipbuilding costs. He takes various medications for his multiple medical problems. He stopped working on April 4, 2000 because of the work stress and because he found himself taking too many nitro tablets. Dr. Mirback told Claimant to stop working and go out on long term disability

or find less stressful work. He has not worked since then and, as he is now removed from that stressful situation, he has not had to take nitro since April 4, 2000. (TR 57-122)

Paul D. Campo, who worked at the Employer's shipyard from March of 1978 until his layoff in May of 1999, testified that he worked closely with Claimant, that he has "never seen anyone else at Electric Boat who has been subjected to as much stress and pressure as Mr. Bursell," that Claimant received countless "E" mails daily with reference to the problems he faced daily, that he had "enormous responsibilities" over those years and those "incredibly huge projects . . . broke new ground. (TR 122-125)

Michael J. Severino, the Employer's Manager of Nuclear Quality Control Engineering since August of 1996, testified that he is Claimant's immediate supervisor, that he coordinates the work of that group and that his previous staff of ten has now been downsized to five. Mr. Severino was aware that Claimant was being treated for a heart condition, that his doctor had limited the number of hours he could work daily, that he "was prepared to accommodate that" restriction and that he was an "excellent employee." Mr. Severino testified further that he would be prepared to give Claimant one task at a time and allow him to complete that assignment before giving him another assignment in order to eliminate or decrease the stress to which Claimant would be exposed. He also agreed with Claimant's testimony as to how often he would go on board the boats to check out and resolve a particular problem and that, at certain times, the "difficult situations... can get a little uncomfortable" and that it "would probably" be difficult to limit contacts with the Claimant by trade foremen, engineers, etc. However, Mr. Severino would expect his workers to be available eight hours per day and that "absolutely" the Employer's finance department would not, at this time of severe shipyard downsizing, permit Claimant to sit at his desk two or three hours a day, do one job per week and earn $60,000.00 for that sheltered employment. (TR 134-149)

Claimant's voluminous medical records reflect that he was examined by Dr. Romain on March 18, 1997 and the doctor, a specialist in rheumatology, gave the following impression and made these recommendations (EX 3):

IMPRESSION: Reviewed in detail with Dr. Romain, and Dr. Romain saw and examined the patient with the following impression and

recommendations.

1. Persistent crystalline arthropathy, pseudogout, possibly complicated by gout. A less likely possibility is the inflammatory arthropathy associated with ulcerative colitis.

RECOMMENDATIONS:

1. Will recheck the serum uric acid level in several weeks after this attack has resolved.

2. Hydrochlorothiazide gel 80 units intramuscularly today.

3. Colchicine one tablet daily for one week and if tolerated, increase to one tablet b.i.d. This is for prophylaxis.

4. Prednisone 5 mg tablet with instructions to take six tablets daily for three days and decrease by one tablet daily every three days until he is on 15 mg (three tablets) daily, then decrease by one half tablet daily every three days. The patient was instructed to stay on the lowest dose of the Prednisone that controls his joint inflammation.

5. Return visit in five to six weeks with Dr. Romain. He should notify us if within two days his symptoms have not significantly improved and we will further guide his treatment, according to the doctor.

Dr. Peter Milstein gave the following impression on November 2, 1998 (CX 5):

Mild to moderate Cardiomyopathy, etiology unclear, with normal coronary anatomy. The patient will be placed in digoxin, afterload reduction, referred back to Dr. Haronian, his physician, for consideration of carvedilol therapy.

Dr. Bruce E. Mirbach, a cardiovascular specialist, examined Claimant on December 21, 1998 and the doctor reported as follows (EX 8):

51-year-old man from Rhode Island. History of moderate congestive cardiomyopathy. History of ulcerative colitis, colon cancer, colectomy here.

Cardiac catheterization at Lawrence Memorial Hospital showed normal coronaries, left ventricular end diastolic pressure of 16, normal systolic blood pressure and an ejection fraction of 35-40%.

Echocardiogram here shows ejection fraction of 40-45%, no significant valvular disease, pulmonary artery pressure of 25, probably left ventricular hypertrophy that is mild. At least once in the past he has had high blood pressure.

Recently he had extreme fatigue. I took him off his Coreg, his fatigue went away but when he got emotional or did heavy physical activities he would get chest discomfort lasting "for hours". He is on Digoxin and an ACE inhibitor. I will put him back on low-dose Coreg 3.125 twice a day.

EXAMINATION: The blood pressure is 130/70, pulse 60 and regular. Chest clear. Cardiac examination mid-systolic click.

DISCUSSION: About a third of these patients get better, a third stay the same, and about a third deteriorate. I explained to him that beta blockers and ACE inhibitors are really the only drugs we have that "improve outcome". He understands. I have told him to stay away from alcohol, follow his blood pressure, get mild exercise and we will keep an eye on his heart function. He will get back to Dr. Gaeta as well, according to the doctor.

Dr. Lawrence Baker "reviewed (Claimant's) voluminous medical and hospital records" and he sent the following letter to Claimant's attorney on August 3, 1999 (CX 1):

Mr. Bursell had been employed at General Dynamics/Electric Boat since 1969 as an analyst. After 1976, he went to work on a new construction and currently is working as a supervisor.

As a supervisor, he is subjected to a great deal of stress and uncertainty. This is particularly true in the last several years, where there have been significant layoffs and an increased demand for production in the shipyard. He has personally been in involved in having to layoff a number of individuals and make significant adjustments in terms of work force and scheduling.

Mr. Bursell's past medical history is of extreme significance. He had a history of ulcerative colitis diagnosed in 1981, which eventually required a total abdominal colectomy for bleeding and

for sigmoid colon cancer in April of 1989... He was followed prospectively with satisfactory progress and no evidence of tumor recurrence, including abdominal CT scans and serial CEA determinations...

Included within your file were rheumatologic evaluations, which took place March 18th 1997. The patient indicated at that time that in February of 1997, he was admitted to the Westerly Hospital for evaluation of acute right great toe, right ankle, foot, and right knee joint inflammation. Eventually, Mr. Bursell was diagnosed with pseudogout, received injections of cortisone and lidocaine in the right great toe, metatarsal phalengeal joint... His attacks of joint inflammation in the past were not associated with flare-ups of his ulcerative colitis.

After a very thorough rheumatology evaluation with Dr. Romain, the impression was persistent crystalline arthropathy, pseudogout, possibly complicated by gout, less likely possibility is the inflammatory arthropathy associated with ulcerative colitis.

In May of 1993, there was a hospitalization at Lawrence & Memorial Hospital, when Mr. Bursell was 45 years of age. He was seen because of chest pain. It was noted that he has few risk factors for coronary disease. He has presented with one-half to one hour of left somewhat pleuritic chest pain, without nausea, vomiting or shortness of breath. There was no preceding chest wall trauma and/or stress. The pains abated after being in the hospital for about an hour. His risk factors for coronary disease were few with negative smoking history; negative history of diabetes, hypertension, or family history.

An echocardiogram was done and showed insufficient aortic insufficiency, mild evidence for diastolic compliance abnormalities, with mild left ventricular hypertrophy...

I reviewed a consultation that took place October 30th 1998. At that time, again, Mr. Bursell was admitted with chest pain. It notes a year’s history of chest discomfort. It also notes that he had hypertension and was placed on Prinivil. Over the preceding week prior to October 30th 1998, he had been having exertional and non-exertional chest discomfort, lasting 15-20 minutes, described as a heavy pressure and a tight feeling in his left chest radiating toward his left shoulder. He had had no shortness of breath, seating, nausea, or vomiting. The risk

factors were noted to be hypertension and family history.

A stress test performed at that time was positive to stage III with a heart rate of 150. It was positive for pain, positive for inferolateral ST and T wave changes. Chest x-ray was negative. Enzymes were negative. The impression was chest pain with abnormal stress, coronary disease to be considered, and he was placed on beta blockers, salicylates, and his Prinivil was stopped. It was felt that he needed a cardiac catheterization.

Cardiac catheterization was performed on November 2nd 1998. The left ventriculogram revealed apical wall motion abnormality. The ejection fraction was 35-40 percent. The coronary vessels were normal. The impression was mild to moderate cardiomyopathy, etiology unclear, with normal coronary anatomy. The patient was placed on Digoxin after load reduction and he was referred back to Dr. Haronian for consideration of carvedilol therapy.

On November 20th 1998, an exercise treadmill test was performed and that test was non-diagnostic for ischemia.

As of February 3rd 1999, Mr. Bursell was being maintained on Prinivil, Digoxin, Prilosec, and Coreg. He also was on PRN Nitrostat.

When seen by Dr. Mirbach, a cardiologist, on February 3rd 1999, it is noted that Mr. Bursell was 51 years of age, had an ejection fraction of 45 percent, and had normal coronaries. It notes that he had diarrhea, got dehydrated, and wound up in his local hospital, but was now doing better. It notes that he suffered left chest discomfort when he pushes himself. He was given instructions prior to February 3rd 1999 to work no more than 4 hours a day, get plenty of rest, and try to walk 1 mile four times a day. Dr. Mirbach noted that Mr. Bursell was having a great deal of stress at work because there was so much work to do. He had cautioned him against working too much. He also thought that he might have to go on long term disability.

It is my medical opinion that Mr. Gary Bursell has significant medical problems. He has had ulcerative colitis, has had associated colon cancer, and required several surgical procedures for that condition... He certainly has a propensity to become somewhat dehydrated and certainly stresses in general, in all probability, aggravate his condition...

Mr. Bursell also has an ideopathic congestive cardiomyopathy, which has been documented over the past several years. He requires a medication program, such as has been noted above. His congestive cardiomyopathy certainly is aggravated by stress, both exertional and emotional, and in my judgement, the stresses inherent in his work at General Dynamics/Electric Boat have caused aggravation of the underlying cardiomyopathy.

Finally, it is my medical opinion that Mr. Bursell is totally and permanently disabled from his prior position with General Dynamics/Electric Boat. His disability bears a direct relationship to the stresses endured at work, which stresses have aggravated his underlying cardiomyopathy and which stresses have contributed to his constellation of symptomatology, which include evidences of congestive heart failure and severe chest pain, according to Dr. Baker.

Dr. Baker reiterated his opinions at his August 8, 2000 deposition, the transcript of which is in evidence as CX 19. Dr. Baker testified forthrightly and persuasively and his opinions withstood cross-examination by Employer's counsel.

Claimant has also been examined by Dr. Daniel R. Gaccione, an orthopedic surgeon, and the doctor sent the following letter to Claimant's attorney on September 9, 1999 (CX 7):

I had the opportunity to examine Gary Bursell in my office on August 18, 1999 for continuing problems related to his lower back. At the time of his examination, I was able to also review the medical records of Dr. W. Scoville. As you know, Mr. Bursell underwent two surgical procedures on his back for an L4/L5 herniated disc in 1978 after reportedly sustaining an injury in a fall while employed at Electric Boat. His radicular symptoms resolved after the surgery. He has intermittent discomfort in his lower back with any kind of heavy activity. He is now employed in a more sedentary position at Electric Boat.

His physical examination revealed evidence of a well-healed surgical incision. He has some localized tenderness in his lower back and over the sacroiliac joints. His neurologic exam is otherwise intact. X-ray studies revealed marked disc space narrowing at L4/L5 consistent with the site where he has had his laminectomy.

It is my opinion within a reasonable degree of medical

probability, that Mr. Bursell does have a level of impairment secondary to the back injury noted above. I determined his impairment to be five percent (5%) based on table 72, DRE impairment category II on page 110 of the *American Medical Association Guide to the Evaluation of Permanent Impairment, Fourth Edition*. This converts to a regional lumbar spine impairment of seven percent (7%) using the conversion factor in paragraph 3.3 on page 131 of the *AMA Guides*.

Based on the patient's clinical history and x-ray findings, he should have permanent restrictions placed on his activities at work. These would include no lifting greater than 15-20 pounds, no crawling, climbing, bending, or stooping. He should also avoid any prolonged standing or walking, as well as operating any heavy machinery while sitting, according to the doctor.

The record also reflects Dr. William B. Scoville saw Claimant on November 20, 1979, "three months post-op removal of a recurrent L4-5 ruptured disc" and the doctor conservatively rated Claimant's impairment at "10% disability for each of the two major spine operations" Claimant underwent. (EX 1)

The parties deposed Dr. Joseph R. Gaeta, a cardiologist, on May 2, 2000 (CX 8) and the doctor, who is Board-Certified in Internal Medicine and in Cardiovascular Disease, testified that he examined Claimant on September 15, 1999, that Claimant has experienced cardiac problems since at least November of 1993, and perhaps even a year earlier than that date, that the cardiac problems were manifested on the abnormal echocardiogram, that such left ventricular hypertrophy is "generally permanent," that his dilated or enlarged heart is also a permanent condition, that his chest x-ray showed "calcium plaques in the lining of the lung," that his ulcerative colitis could have been aggravated by the stressful work conditions and that Claimant's cardiomyopathy, **i.e.**, "a disease of the heart muscle," "may have various causes." Claimant's cardiomyopathy has resulted in a NYHA Class II B impairment, **i.e.**, "cardiac disease resulting in slight limitation of physical activity." Dr. Gaeta also opined that Claimant's work stress would have aggravated his essential hypertension, thereby increasing his impairment. (CX 8)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet**

Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has

considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection

between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's

pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the

presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See Gean Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 1480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his cardiomyopathy (CX 1), resulted from working conditions at the Employer's shipyard. The Employer has not introduced substantial evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

However, I now must resolve whether or not Claimant's work as a Nuclear Quality Analyst has satisfied the jurisdictional requirements of the Longshore Act.

Coverage

Generally, an employee is covered by the Act if he meets two tests: the status test and the situs test. **See generally Northeast Marine Terminal Co. v. Caputo**, 432 U.S. 249 (1977). An employee who would have been covered under the pre-amendment Act, **i.e.**, who was injured over water, is covered by the amended Act, without reference to the status test. **See Director v. Perini North River Associates**, 459 U.S. 297, 103 S.Ct. 634 (1983). Claimant was not injured over water, and therefore must meet both the status test and the situs test.

The situs test refers to the place at which the employee worked or was injured. Covered locations include navigable waters and adjoining areas used to load, unload, repair or build a vessel. **See** Section 2(4) of the Act. Claimant's employment occurred in the Employer's main yard which adjoins

navigable waters and which is used for ship building and repair. Claimant therefore meets the situs test based upon this employment.

The status test refers to the employee's occupation. Covered occupations include longshoremen, harbor-workers, ship repairers and shipbuilders. **See** Section 2(3) of the Act.

Claimant's coverage by the Act during his most recent employment as a Nuclear Quality Analyst has actually been challenged by the Employer as non-maritime employment. The general rule is that employees are covered if their duties are an "integral part" of traditional longshoring and shipbuilding or ship repairing processes. The Supreme Court has concluded that, at a minimum, clerical workers are not covered by the Act. The Court explained the Congressional intent was to cover those workers engaged in the essential elements of unloading a vessel, taking cargo out of a hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area. [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Excluded are employees who perform purely clerical tasks and are not engaged in the handling of cargo. **Northeast Marine Terminal Co. v. Caputo**, 434 U.S. 249, 266-67 (1977). The **Caputo** Court relied upon the following passage from the legislative history:

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in loading and unloading functions are covered by the new amendment. S. Rep.

No. 92-1125, 92d Cong., 2d Sess. 13, 1972 U.S. Code Cong & Admin. News 4708.

The Benefits Review Board has consistently held that the Section 20(a) presumption that a claim comes within the provisions of the Act is inapplicable to the threshold issue of jurisdiction. **Sedmak v. Perini North River Associates**, 9 BRBS 378 (1978); **aff'd sub nom. Fusco v. Perini North River Associates**, 601 F.2d 659 (2d Cir. 1979), **cert. granted**, **vacated and remanded**, 444 U.S. 1028 (1980), 622 F.2d 1111 (2d Cir. 1980) (**decision on remand**). **Wynn v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 31 (1983); **Boughman v. Boise Cascade Corporation**, 14 BRBS 173 (1981); **Holmes v. Seafood Specialist Boat Works**, 14 BRBS 141 (1981). However, the United States Court of Appeals for the Fifth Circuit has held that "(t)he judicial policy has long been to resolve all doubts in favor of the employee and his family and to construe the Act in favor of the employee for whose benefits it is primarily intended," **Army Air Force Exchange v. Greenwood**, 585 F.2d 791 (5th Cir. 1978), and that the policy of the Act has been "to resolve doubtful questions of coverage in the Claimant's favor." **Tampa Ship Repair v. Director**, 535 F.2d 936, 938 (5th Cir. 1976).

The aforementioned **Sedmak** test for status requires a determination of whether Claimant's work had a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters.

On the basis of the totality of the record and having in mind the beneficent purposes of the Act and the remedial nature of that legislation, I hold that Claimant’s work does satisfy the **Sedmak** test. Clearly, his work bears a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters as I find that his work as a Nuclear Quality Analyst constituted an integral part of and a necessary ingredient in the shipbuilding process for the following reasons.

Initially, I note that Claimant’s job duties and responsibilities are detailed in the record at CX 9 and CX 10 and those duties and responsibilities are incorporated herein by reference.

I also note that Claimant’s 1978 injury occurred in the shipyard and the Employer, in fact, accepted his claim under the

act, that his work as a Nuclear Quality Analyst took place through the entire shipyard, including actual work onboard ships under construction at the yard, that he also had to travel to other shipyards such as Newport News and, therefore, was exposed to stress at several maritime locations.

In **Northeast Marine Terminal v. Caputo**, 432 US 249 (1977), the United States Supreme Court rejected the "moment of injury" test and held that a claimant is covered if his work at least is in part involved in maritime employment.

In **P.C. Pfeiffer co. v. Ford**, 444 US 69 (1979), the court emphasized that the status test is occupational and that a worker is covered if his work falls within the general category of maritime employment. Generally work is maritime if it is integral to or an essential part of maritime work. **See Chesapeake & Ohio Railroad Co. v. Schwalb** 493 US 40 (1989); **Northeast Marine Terminals v. Caputo**, 432 US 249 (1977).

While some of Claimant's work took place in an office, there was absolutely no evidence that any of his work was clerical in nature. Indeed he exercised supervisory and control functions over shipyard duties involving correcting and resolving shipyard problems, problems that were an essential part of his maritime employment and the shipbuilding process.

Furthermore, much of his work took place onboard ships under construction at Groton and at Newport News and in the adjoining shipyards. Indeed, his actual job was to assure that ships were built to quality specifications, and no ship could be turned over to the Navy unless it had passed Nuclear Quality Control and his approval.

Claimant also had and exercised direct control in the shipbuilding process, stopping work during "key event" operations, or approving the start of nuclear tests.

I note that the Employer submits that the claim must be rejected because Claimant's duties as a Nuclear Quality Analyst are not unique or peculiar to the shipbuilding industry because his job duties could have taken place elsewhere. I cannot accept that thesis as I must look to Claimant's **actual duties** and **where he performed them**. As the so-called "moment of injury" test has been rejected by the U.S. Supreme Court, I must look to Claimant's overall work duties and his job title or

union affiliation is irrelevant to this determination.

As noted above, Claimant frequently assisted in the redesign of the ship on those occasions when design errors prevented construction of the submarine as drawn. This work often required going down to view the ship, conduct negotiations with the shipyard workers and engineers who were responsible for performing the actual work and then making the necessary design changes. Claimant also was responsible for the development of quality assurance programs and computer assisted record keeping used to ensure that each item on the submarine was installed correctly and according to U.S. Navy specifications and designs. (CX 11)

Therefore, in view of the foregoing, I find and conclude that Claimant has satisfied both the status and situs requirements of the Longshore Act and that his back and cardiac injuries come within the jurisdiction of and are compensable under the Longshore Act.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping**

v. Nash, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

Claimant’s medical evidence has been extensively summarized above and that evidence clearly reflects that Claimant’s preexisting essential hypertension and cardiovascular disease were aggravated, accelerated and exacerbated by the stressful conditions at work and that the date of injury is April 5, 1999. In so concluding, I have credited the well-reasoned and well-documented reports of Dr. Baker (CX 1), Dr. Mirbach (CX 4), Dr. Gaeta (CX 8), as well as the reports from the Lahey Clinic Medical Center Hospital. (EX 11) There is simply no probative or persuasive contrary medical evidence rebutting the statutory provision in Claimant’s favor, and I so find and conclude for the following reasons.

There is no dispute that Claimant's back injury arose out of and in the course of his employment. He fell at the shipyard and the Employer paid total disability benefits while he was out of work. There is also no factual dispute that his cardiac condition is work-related for the following reasons.

As noted above, the term injury means such injury or disease as naturally arises out of employment 33 U.S.C. 902(2) **U.S. Indus. / Fed. Sheet Metal v. Director, OWCP, supra**. A work-related aggravation of a pre-existing condition is an injury. **Preziosi v. Controlled Ind.**, 22 BRBS 468 (1989).

Moreover, the employment related injurious stimuli need not be the sole or even primary factor in creating a disability. If the employment related injury contributes to or aggravates a pre-existing or non work related condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986). **Rajotte v. General Dynamics, supra**.

I also note that the Employer's own doctor agreed that Claimant's "work aggravated his disease." This testimony read in conjunction with Dr. Baker's equally concise opinion that the Claimant's work aggravated his condition leads to the conclusion that there is, in fact, no dispute about the causation of Claimant's cardiac condition, and I so find and conclude.

Moreover, while Dr. Sandoval did check off the non-work-related box on the Claimant's application for total disability under his long term disability plan (EX 13), this is not dispositive. The Claimant has cardiomyopathy which is idiopathic, that is of unknown origin. Dr. Gaeta, the Employer's doctor admitted that the actual condition may be due to work-related hypertension, but agreed that work related stress was an aggravating factor. The ultimate cause of the condition may never be known, but the proximate contributing cause is clearly work- related stress, and I so find and conclude.

It is not disputed that Claimant suffers from a severe and potentially life threatening condition consisting of cardiomyopathy, which has resulted in repeated hospitalizations and extensive limitations on his physical activity. He is markedly restricted in terms of avoidance of mental and emotional stress. These limitations are layered over the restrictions coming from his back injuries, as well as the

problems he has as a result of his colon cancer and dehydration.

Dr. Sandoval has indicated that he has "class five" limitations which render him totally disabled and the Employer has admitted this by accepting his claim for lesser benefits under their long term disability plan. Despite this admission, the Employer declines to admit disability under the Act.

As noted above, the Employer submits that Claimant's application for long-term disability benefits for his multiple medical problems bars this claim under the Longshore Act. First of all, I find and conclude that claimant had to file that application because he had been out of work since April 4, 1999, was unable to work anywhere else and that he was forced to file for those benefits because he was without funds because the Employer has continually treated Claimant's cardiomyopathy as a personal illness, even in the face of the opinion of Dr. Gaeta, its medical expert. The Longshore Act envisions that these claims be resolved as expeditiously as possible, and such has not occurred here.

Moreover, that application filed on July 1, 2000 (EX 14) is not dispositive on the causality issue for the following reasons.

First of all, the application for long term disability included a number of other medical conditions from which Claimant suffers and which may or may not be work-related.

Therefore, for the purposes of a long term disability claim, Claimant relied on multiple medical problems, many of which are not claimed to be work-related.

The second problem, of course, relates to the legal definition of injury.

Claimant readily admits that he has pre-existing myocardial disease, the etiology of which is unknown. However, as a matter of law, if his work aggravated or accelerated his condition in any way, then it is held to be compensable, and I so find and conclude.

Dr. Sandoval clearly was applying an ultimate cause test to this question rather than the legal one of proximate cause. Is his initial heart condition work-related? No one knows, although Dr. Gaeta said the Claimant's work may have caused his

hypertension which may have caused his cardiomyopathy, but all of the doctors agreed that work-related stress aggravated this condition.

The testimony of all the doctors in the case, including the Employer's, was that the Claimant's stress at work had aggravated his underlying conditions and was, thus, a proximate cause aggravating his heart condition and resulting in disability, and I so find and conclude.

Accordingly, in view of the foregoing, I find and conclude that Claimant's cardiac and lumbar problems are causally related to his maritime employment.

Timely Notice of Injury

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty (30) days after the employee or beneficiary is aware of a relationship between the injury or death and the employment. In the case of an occupational disease which does not immediately result in disability or death, appropriate notice shall be given within one (1) year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship among the employment, the disease and the death or disability. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. **Osmundsen v. Todd Pacific Shipyard**, 755 F.2d 730, 732 and 733 (9th Cir. 1985); **see** 18 BRBS 112 (1986) (**Decision and Order on Remand**); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); **Cox v. Brady Hamilton Stevedore Company**, 18 BRBS 10 (1985); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Stark v. Lockheed Shipbuilding and Construction Co.**, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. **Thorud v. Brady-Hamilton Stevedore Company**, 18 BRBS 232 (1986). **See also Bath Iron Works Corporation v. Galen**, 605 F.2d 583 (1st Cir. 1979);

Geisler v. Columbia Asbestos, Inc., 14 BRBS 794 (1981).

Although the Employer did not receive written notice of the Claimant's back injury and his cardiomyopathy as required by Sections 12(a) and (b), **i.e.**, by the filing of the Form LS-201, the claim is not barred because the Employer has had knowledge of Claimant's work-related problems or has offered no persuasive evidence to establish it was prejudiced by the lack of written notice. **Sheek v. General Dynamics Corporation**, 18 BRBS 151 (1986) (**Decision and Order on Reconsideration**), **modifying** 18 BRBS 1 (1985); **Derocher v. Crescent Wharf & Warehouse**, 17 BRBS 249 (1985); **Dolowich v. West Side Iron Works**, 17 BRBS 197 (1985). **See also** Section 12(d)(3)(ii) of the Amended Act.

This Administrative Law Judge is presented with the issue of whether Claimant's failure to provide timely notice as required by Section 12(a) is excused under Section 12(d) where the Employer knows that Claimant is experiencing a work-related problems which have resulted in injuries and disability. Section 12(d) specifies the circumstances when failure to give notice under Section 12(a) will not bar a claim. Under Section 12(d) as amended in 1984, 33 U.S.C. §912(d) (Supp. IV 1986), which is applicable to this case, the failure to provide timely written notice will not bar the claims if Claimant shows **either** that employer had knowledge during the filing period (subsection 12(d)(1)) **or** that Employer was not prejudiced by the failure to give timely notice (subsection 12(d)(2)). **See Sheek v. General Dynamics Corp.**, 18 BRBS 151 (1986), **modifying Sheek v. General Dynamics Corp.**, 18 BRBS 1 (1985).

The Board and the Appellate Courts generally require that in order for the employer to be charged with imputed knowledge under Section 12(d), an employer must have knowledge not only of the fact of claimant's injury but also of the work-relatedness of that injury. **See Sun Shipbuilding & Dry Dock Co. v. Walker**, 684 F.2d 266 (3d Cir. 1982), **aff'g** 14 BRBS 132 (1981), **cert. denied**, 459 U.S. 1039 (1982); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983).

Pursuant to Section 12(a), a claimant has one (1) year from the date of awareness to provide notice of the injury or death in a claim such as this one also involving an occupational disease. **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). Section 12(d) excuses a claimant's failure to give timely notice if employer had actual knowledge of the injury or death;

employer was not prejudiced; or for some reason found satisfactory by this Administrative Law Judge could not be timely given. **Sheek v. General Dynamics Corp.**, 18 BRBS 151 (1986), **modifying Sheek v. General Dynamics Corp.**, 18 BRBS 1 (1985). Contrary to Employer's contention, Employer bears the burden of proving by substantial evidence that it has been unable to investigate effectively some aspect of the claim by reason of the Claimant's failure to provide timely notice as required by Section 12. **Strachan Shipping Co. v. Davis**, 561 F.2d 968, 8 BRBS 161 (5th Cir. 1978), **rev'g**, 2 BRBS 272 (1975); **Williams v. Nicole Enterprises**, 21 BRBS 164 (1988). Although Employer contends that it would be highly inappropriate to place this burden upon it, its argument overlooks the fact that Employer is in a far better position than Claimant to know the manner in which it has been prejudiced by Claimant's failure to provide timely notice.

This issue will be discussed further and resolved in the next section.

Statute of Limitations

Section 13(a) provides that the right to compensation for disability or death resulting from a traumatic injury is barred unless the claim is filed within one (1) year after the injury or death or, if compensation has been paid without an award, within one (1) year of the last payment of compensation. The statute of limitations begins to run only when the employee becomes aware of the relationship between his employment and his disability. An employee becomes aware of this relationship if a doctor discusses it with him. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989). The 1984 Amendments to the Act have changed the statute of limitations for a claimant with an occupational disease. Section 13(b)(2) now requires that such claimant file a claim within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship among his employment, the disease, and the death or disability. **Osmundsen v. Todd Pacific Shipyards**, 755 F.2d 730 (9th Cir. 1985), and the Board's **Decision and Order on Remand** at 18 BRBS 112 (1986); **Manders v. Alabama Dry Dock & Shipbuilding**, 23 BRBS 19 (1989). Furthermore, pertinent regulations state that, for purposes of occupational diseases, the respective notice and filing periods do not begin to run until the employee is

disabled or, in the case of a retired employee, until a permanent impairment exists. **Lombardi v. General Dynamics Corp.**, 22 BRBS 323, 326 (1989); **Curit v. Bath Iron Works Corp.**, 22 BRBS 100 (1988); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); 20 C.F.R. §702.212(b) and §702.222(c).

The Benefits Review Board has discussed the pertinent elements of an occupational disease in **Gencarelle v. General Dynamics Corp.**, 22 BRBS 170 (1989), **aff'd**, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); **Fortier v. General Dynamics Corporation**, 15 BRBS 4 (1982), **appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board**, 729 F.2d 1441 (2d Cir. 1983).

Section 30

Section 30(a) of the Act provides that within ten (10) days from the date of any injury which causes loss of one or more shifts of work (a requirement added by the 1984 Amendments), or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary of Labor and to the appropriate District Director a first injury report (Form LS-202) containing the pertinent information about such injury or death. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989); **Paquin v. General Dynamics Corp.**, 4 BRBS 383 (1976). Section 30(f) provides that where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of any employee, and fails, neglects, or refuses to file the appropriate report required by Section 30(a), the statute of limitations of Section 13(a) shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report has been filed with the Secretary and/or the Deputy Commissioner. **See** 20 C.F.R. §702.205. Section 30(f) should be read in conjunction with the three subsections of Section 12(d) and the definitions of employer knowledge and the several reasons whereby the failure to give timely notice may be excused by this Administrative Law Judge.

The Benefits Review Board has consistently held that knowledge by the employer that one of its employees has sustained an injury is sufficient to constitute knowledge under Section 30(f). However, an employer's awareness of the general hazards at the place of employment is insufficient to put an employer on notice of an injury to a specific employee as required by the Act. **Sun Shipbuilding & Dry Dock Co. v. McCabe**, 593 F.2d 234 (3d Cir. 1979); **Sun Shipbuilding & Dry Dock Co. v. Bowman**, 507 F.2d 146 (3d Cir. 1975); **Gencarelle v. General Dynamics**, 22 BRBS 170 (1989), **aff'd** 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989); **Pryor v. James McHugh Construction Company**, 18 BRBS 273 (1986). Moreover, lack of education or sophistication does not constitute an excuse within the meaning of Section 12(d)(2). **Arcus v. Sun Shipbuilding and Dry Dock Co.**, 16 BRBS 34, 37 (1983).

As noted above, under Sections 12(d)(1), (2) and (3) of the Act, failure to give proper written notice under Section 12(a) will not bar a claim if the employer had knowledge of the injury during the filing period or the administrative law judge determines that employer has not been prejudiced by failure to give timely notice. 33 U.S.C. §§912(d)(1) and (d)(2). **Noack v. Zidell Explorations**, 17 BRBS 36 (1985); **McQuillen v. Horne Brothers, Inc.**, 16 BRBS 10 (1983). **See also** 20 C.F.R. §702.216, effective January 31, 1986, which provides that this Administrative Law Judge may excuse such failure to give notice in those situations where "for some satisfactory reason such notice could not be given." **Sheek v. General Dynamics Corp.**,18 BRBS 11 (1985), **Decision and Order on Reconsideration**, 18 BRBS 151, 153 (1986).

The Section 12(d)(1) requirement that the employer have "knowledge" of the injury requires, generally, that the employer have knowledge of the injury and its relationship to the employee's work. **Strachan Shipping Co. v. Davis**, 571 F.2d 968 (5th Cir. 1978); **Sun Shipbuilding & Dry Dock Co. v. Bowman,** 507 F.2d 146 (3d Cir. 1975). In appropriate cases, knowledge of an employee's work-related injury may be imputed to the employer where the record indicates that the employer knew of the injury and had facts that would lead a reasonable person to conclude that compensation liability is possible so that further investigation into the matter is warranted. **Sheek v. General Dynamics Corp.**, 18 BRBS 1 (1985), **Decision and Order on Reconsideration**, 18 BRBS 151 (1986). **See also, Addison v.**

Ryan-Walsh Stevedoring Company, 22 BRBS 32 (1989); **Matthews v. Jeffboat**, 18 BRBS 185 (1986); **Mattox v. Sun Shipbuilding and Dry Dock Company**, 15 BRBS 162 (1982).

The Board has construed the Section 12(d)(1) exception in a narrow fashion. **See, e.g., Carlow v. General Dynamics Corp.**, 15 BRBS 115 (1982). However, knowledge may be imputed to the employer under certain circumstances. **Voris v. Eikel**, 346 U.S. 328 (1953). In **Voris**, an illiterate employee was injured in a flash fire on a ship, and knowledge was imputed to the employer where both the working foreman and gang foreman knew of the injury. In **Voris**, the court considered it significant that the accepted practice was for the injured employee to report his injury to his immediate supervisor. **See also Perkins v. Marine Terminal Corp.**, 16 BRBS 84 (1984).

Failure to give timely notice has been excused, pursuant to Section 12(d)(2), in circumstances such as where both claimant and his physicians were unsure as to the relationship between the injury and the employment. **See Jordan v. General Dynamics Corp.**, 4 BRBS 201 (1976); **Shillington v. W.J. Jones & Son, Inc.**, 1 BRBS 191 (1974), and where claimant lacked knowledge of his employer's identity and could not locate the person who hired him. **Johnson v. Treyja, Inc.**, 5 BRBS 464 (1977). **See also Jasinskas v. Bethlehem Steel Corp.**, 735 F.2d 1, 16 BRBS 95 (CRT) (1st Cir. 1984), **vacating and remanding** 15 BRBS 367 (1983).

Section 13 of the Longshore Act provides that the claim for compensation need not be filed until the employee is aware of the relationship between the injury and the employment. 33 U.S.C. 913(a)

This Administrative Law Judge, in evaluating this issue, notes that the Claimant is assisted by the Section 20(b) presumption, which applies to the Section 13 notice requirement. **Carlow v. General Dynamics**, 15 BRBS 115 (1982)

Therefore, the Employer must prove its special defense that the claim was not timely filed. Part of its burden is to prove that it also filed a “first notice of injury” in compliance with Section 30 of the Act before it can prevail under Section 13. **McQuillan v. Horne Bros. Inc.**, 16 BRBS 10 (1983); **Fortier v. General Dynamics**, **supra**.

In this case the Employer has failed in its burden of proof. The Claimant first began having cardiac difficulties in 1999 when his doctor advised him to begin working part time, thereby resulting in economic disability when these problems affected his wage-earning capacity. There was no evidence introduced at the trial that the Claimant was aware he had a work-related injury prior to this time.

In February of 1999, a timely claim for compensation was filed just prior to his leaving work entirely in April of 1999.

Clearly, the claim was filed within a year from the date of the cardiac injury and disability. Furthermore, the Employer was kept fully informed of the Claimant's condition and his need for reduced work. It was given written notice from the Claimant's attending physician of the Claimant's medical condition and need for modified work. Therefore, the Employer had the equivalent medical and employment knowledge available to it regarding the Claimant's condition and its possible work related nature, and I so find and conclude.

Despite this equivalent knowledge, the Employer neglected to file a "First Notice of Injury" as required by Section 30, (or at least failed to offer proof of such a filing at trial).

Furthermore, the Claimant need not file a claim until he becomes aware of the full character, extent and impact the harm done to him. **Shipyards v. Allan**, 666 F.2d 399 (Cir. 19) Indeed, the Claimant need not file for compensation until he is aware of the full character of his condition and thinks that it would probably diminish his capacity to earn a living. **Brown v. ITT/Continental Baking Co.**, 921 F.2d 289, 24 BRBS 75 (CRT)(D.C. Cir. 1999)

In **Brown**, the issue was phrased in terms of whether the employee reasonably believed that he had suffered a work related harm which would probably diminish his capacity to earn.

In short, in the case at bar the totality of the evidence establishes that the cardiac claim was timely filed. The Employer failed to prove its filing under Section 30 of the Act, which would toll the time for filing of the claim. Accordingly, it is clear that the cardiac claim it timely, and I so find and conclude.

Regarding the back claim, the Claimant suffered an injury in 1978 and was in fact paid workers' compensation for that injury. Therefore, the Employer had notice of the injury but failed to prove it filed a Notice of Claim under Section 30 of the Act. Therefore, the time for filing claims was tolled, and the unrebutted Section 20 presumption required that it be found that the back claim and the cardiac claim were timely filed.

In addition, a claim for medical benefits under the Act is never time barred. **Golburn v. General Dynamics Corporation**, 21 BRBS 219 (1998).

The Employer has a continued obligation to pay for an injured employee's medical expenses even if the claim for Section 8 compensation is time barred. **Strachan Shipping company v. Hollis**, 460 F.2d 1108 (5th Cir.), **cert. denied**., 409 U.S. 887 (1972).

Accordingly, as Claimant's date of injury/disability is April 4, 1999, Claimant timely gave notice to the Employer by the appropriate forms dated February 2, 1999. (CX 20, CX 21) Thus, Claimant, in my judgment, has satisfied the requirements of Sections 12 and 13 of the Act as the record does not reflect that the Employer filed the Form LS-202, as required by Section 30 of the Act.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of

his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a Nuclear Quality Analyst. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any probative or persuasive evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

While Employer’s counsel mused at the hearing that the Employer would permit Claimant to work four hours per day, do one task at a time and earn $60,000.00 per year in such sheltered employment, the Employer’s Finance Department has not approved such arrangement. I agree with Mr. Severino who

testified that the Finance Department “absolutely” would not approve that arrangement, especially at this time of severe employee downsizing at the shipyard. (TR 143) Thus, I find and conclude that the Employer has not made a **bona fide** job offer to the Claimant.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant’s condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968),

cert. denied. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

On the basis of the totality of the record, I find and conclude that Claimant has been permanently and totally disabled from April 5, 1999, according to the well-reasoned opinion of Dr. Mirbach, at which time Claimant was forced to discontinue working as a result of his occupational disease.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under

28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Failure to begin compensation payments or to file a notice of controversion within twenty-eight (28) days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to ten (10) percent of the overdue compensation. The first installment of compensation to which the Section 14(e) assessment may attach is that installment which becomes due on the fourteenth day after the employer gained knowledge of the injury or the potential dispute. **Universal Terminal and Stevedoring Corp. v. Parker**, 587 F.2d 608 (3d Cir. 1978); **Fairley v. Ingalls Shipbuilding**, 22 BRBS 184 (1989), **aff'd in pert. part** and **rev'd on other grounds sub nom. Ingalls Shipbuilding v. Director**, 898 F.2d 1088 (5th Cir. 1990), **rehearing en banc denied**, 904 F.2d 705 (June 1, 1990) **Krotsis v. General Dynamics Corp.**, 22 BRBS 128 (1989), **aff'd sub nom. Director, OWCP v. General Dynamics Corp.**, 900 F.2d 506, 23 BRBS 40, 51 (2d Cir. 1990); **Rucker v. Lawrence Mangum & Sons, Inc.**, 18 BRBS 76 (1987); **White v. Rock Creek Ginger Ale Co.**, 17 BRBS 75, 78 (1985); **Frisco v. Perini Corp.**, 14 BRBS 798 (1981). Liability for this additional compensation ceases on the date a notice of controversion is filed or on the date of the informal conference, whichever is earlier. **National Steel & Shipbuilding Co. v. U.S. Department of Labor**, 606 F.2d 875 (9th Cir. 1979); **National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1978); **Spencer v. Baker Agricultural Company**, 16 BRBS 205 (1984); **Reynolds v. Marine Stevedoring Corporation**, 11 BRBS 801 (1980).

The Benefits Review Board has held that an employer's liability under Section 14(e) is not excused because the employer believed that the claim came under a state compensation

act. **Jones v. Newport News Shipbuilding and Dry Dock Co.**, 5 BRBS 323 (1977), **aff'd sub nom. Newport News Shipbuilding & Dry Dock Co. v. Graham**, 573 F.2d 167 (4th Cir. 1978), **cert. denied**, 439 U.S. 979 (1978).

The Benefits Review Board has held that "a notice of suspension or termination of payments which gives the reason(s) for such suspension of termination is the functional equivalent of a Notice of Controversion." **Hite v. Dresser-Guiberson Pumping**, 22 BRBS 87, 92 (19989); **White v. Rock Creek Ginger Ale Company**, 17 BRBS 75, 79 (1985); **Rose v. George A. Fuller Company**, 15 BRBS 194, 197 (1982) (Chief Judge Ramsey, concurring).

§14e(2)

As found above, the Employer learned of Claimant's injury no later than April 4, 1999, at which time he had to stop working because of his multiple medical problems, but paid no compensation and did not file a notice of controversion. Thus, the Employer is liable for a Section 14(e) assessment for the installments due between April 5, 1999 and September 29, 1999, the date of the informal conference.

The Benefits Review Board has held that the Section 14(e) additional assessment is mandatory and cannot be waived by the Claimant. **Tezeno v. Consolidated Aluminum Corp.**, 13 BRBS 778, 783 (1981). Should the District Director's file reflect such filings prior to the informal conference, the Employer's obligation for this ten (10) percent additional compensation would, of course, terminate upon those filings.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-

barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown

in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injuries on or about February 2, 1999 (CX 20, CX 21) and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, in view of the foregoing, the Employer is responsible for the reasonable and necessary medical care and treatment relating to Claimant’s cardiomyopathy, effective February 2, 1999. Claimant is also entitled to an award of future medical benefits for his work-related back problems, effective as of the date of this decision. All of such medical benefits are subject to the provisions of Section 7 of the Act.

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v.**

Director, OWCP, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability

will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the Employer since 1965, (2) that he sustained a serious back injury on February 9, 1979 in a shipyard accident (EX 4), (3) that such injury resulted in two surgical procedures to remove the herniated disc (EX 1A, (4) that such injury resulted in a ten

(10%) lumbar impairment as of May 29, 1980 (EX 1B), as well as the imposition of permanent restrictions, (5) that Claimant's lumbar condition has not returned to the **status quo ante** he enjoyed prior to February 9, 1979, (6) that the Employer retained Claimant as a valued employee, (7) that Claimant's essential hypertension and his cardiomyopathy, since at least the early 1990s, were aggravated by the stressful employment conditions resulting in several hospitalizations for evaluation and treatment of such problems (CX 2), (7) that Claimant finally had to stop working on April 4, 1999 upon his doctor's advice (CX 3) and (8) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability (**i.e.**, his above-enumerated medical conditions) and his April 5, 1999 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Gaeta (CX 8) and Dr. Baker (CX 1). **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on April 5, 1999, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed fee applications on October 18, 2000 (CX 15) and on January 8, 2001 (CX 23),

concerning services rendered and costs incurred in representing Claimant between November 22, 1999 and December 15, 2000. Attorney Stephen C. Embry seeks a fee of $10,783.61 (including expenses) based on 48 hours of attorney time at $200.00, $202.19 and $225.00 per hour and 8 hours of paralegal time at $64.00 per hour.

In accordance with established practice, I will consider only those services rendered and costs incurred after September 29, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's lack of comments on the requested fee, I find a legal fee of $10,783.61 (including expenses of $877.86) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on April 5, 1999, and continuing thereafter for 104 weeks, the Employer as a self insurer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $1,162.79, such compensation to be computed in accordance with Section 8(a) of the Act.

2. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of

the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related lumbar and cardiac problems, as specifically discussed above, referenced herein may require, even after the time period specified in the first Order provision above, subject to the provisions of Section 7 of the Act. As directed above, the medical benefits for Claimant's cardiomyopathy begin on February 2, 1999 and the benefits for his lumbar problems begin as of the date of this decision.

5. The Employer shall pay to Claimant's attorney, Stephen C. Embry, the sum of $10,783.61 (including expenses) as a reasonable fee for representing Claimant herein after September 29, 1999 before the Office of Administrative Law Judges between November 22, 1999 and October 12, 2000.

6. The Employer shall also pay to the Claimant, pursuant to the provisions of Section 14(e), additional compensation on those installments of compensation due between April 5, 1999 and September 29, 1999, the date of the informal conference.

_____

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:jl